

178. Tennis Channel's own documents also show that – like Comcast – Time Warner Cable, Charter, Cablevision, Dish Network, and Verizon all refused to grant Tennis Channel broad carriage between 2009 and 2010, citing Tennis Channel's high cost and lack of consumer demand.⁴⁶² These distributors' decisions confirm the testimony that Tennis Channel's programming is not sufficiently compelling to attract new subscribers, and provide independent evidence that Comcast declined Tennis Channel's 2009 proposal for legitimate business reasons, not because of affiliation.⁴⁶³

II. Tennis Channel Has Failed to Establish That Comcast Has Unreasonably Restrained Its Ability to Compete Fairly

179. With 26 million subscribers, Tennis Channel is a successful network.⁴⁶⁴ And as one of the first large distributors to launch Tennis Channel, Comcast has contributed significantly to that success.⁴⁶⁵ Tennis Channel has benefited from a [REDACTED] increase in Comcast subscribers since the end of 2005, including through broad distribution on approximately [REDACTED] Comcast systems.⁴⁶⁶ As of the end of 2010, Comcast carried Tennis Channel to more subscribers than any distributor not affiliated with Tennis Channel.⁴⁶⁷

180. The evidence shows that Tennis Channel is able to compete fairly for subscribers, including substantially all Comcast subscribers, across the country. With

conceded that he proposed granting equity to Dish Network and DIRECTV, which were previously unwilling to carry the network at all, in exchange for greater distribution. *See supra* ¶ 22.

⁴⁶² *See supra* ¶¶ 48-51, 71.

⁴⁶³ *See supra* ¶¶ 53, 72.

⁴⁶⁴ *See supra* ¶ 133.

⁴⁶⁵ *See supra* ¶ 134.

⁴⁶⁶ *See supra* ¶ 134.

⁴⁶⁷ *See supra* ¶ 134.

130 distributors, including Comcast, Tennis Channel is well positioned to compete for additional subscribers.⁴⁶⁸ Its equity-for-carriage deals with DIRECTV and Dish Network give the network access to potential subscribers in every U.S. market.⁴⁶⁹ In every Comcast market, Comcast subscribers who do not wish to purchase Tennis Channel on the sports tier can switch to DIRECTV or Dish Network or, in some markets, to Verizon FiOS, AT&T U-Verse or a cable overbuilder.⁴⁷⁰

181. Tennis Channel argues that merely by declining to distribute the network to additional subscribers, Comcast has “supress[ed] Tennis Channel’s subscriber numbers,” thereby unreasonably restraining its ability to compete fairly.⁴⁷¹ As a matter of fact, however, Comcast cannot be accurately described as “suppressing” Tennis Channel’s distribution when Comcast distributes the network to more than { } million subscribers and makes it available on a sports tier to substantially all of the rest of its subscribers.⁴⁷² As a matter of law, Section 616 is intended to enable non-affiliated programmers to compete fairly, not to insulate them from the need to compete at all for subscribers.⁴⁷³ The requirement of an unreasonable restraint on the ability to compete fairly would be meaningless if it could be satisfied by any decision not to distribute a

⁴⁶⁸ See *supra* ¶¶ 133, 135-37.

⁴⁶⁹ See *supra* ¶ 135.

⁴⁷⁰ See *supra* ¶ 136; *Comcast Corp.*, 579 F.3d at 8; *Status of Competition*, 24 FCC Rcd at 4403 ¶ 4.

⁴⁷¹ Tennis Channel Trial Brief at 16-17.

⁴⁷² See *supra* ¶¶ 134, 136.

⁴⁷³ *WealthTV*, 24 FCC Rcd at 13002 ¶ 73 (“[T]he only restraints proscribed by sections 616 and 76.1301(c) are those that are ‘unreasonabl[e].’” (quoting 47 U.S.C. § 536(a)(3) and 47 C.F.R. § 76.1301(c))).

network to additional subscribers – particularly where, as here, those subscribers already have access to the network on a sports tier, and on competing MVPDs.

182. Further, having enjoyed the benefits of carriage by Comcast for more than six years, it is unfair of Tennis Channel to seek to deprive Comcast of the sports tier right that gained Tennis Channel distribution in March 2005. To hold otherwise would be contrary to Congress’s mandate to “rely on the marketplace to the maximum extent feasible,”⁴⁷⁴ and to the Commission’s aim to serve that mandate without “precluding legitimate business practices common to a competitive marketplace.”⁴⁷⁵

183. The evidence shows that Tennis Channel’s current distribution level results from its own deliberate decisions, including decisions regarding pricing and investment in programming. Tennis Channel has, according to its internal documents, long resisted price reductions sufficient to broaden its carriage, and spends less on its programming than nearly every other national sports network.⁴⁷⁶ Further, Tennis Channel broke off negotiations between the parties after rejecting Comcast’s counteroffer.⁴⁷⁷ Thus, Tennis Channel has failed to satisfy its burden of proving that Comcast’s decision to decline the 2009 proposal is the proximate cause of any harm to Tennis Channel’s ability to compete fairly.

184. Regardless, the evidence shows that Tennis Channel has failed to meet its burden to prove that Comcast’s denial of Tennis Channel’s 2009 proposal was the proximate cause of the harm that Tennis Channel alleges. Tennis Channel’s theory of

⁴⁷⁴ 1992 Cable Act § 2(b)(2).

⁴⁷⁵ *Second Report & Order*, 9 FCC at 2642 ¶ 1; *see also MASN*, 25 FCC Rcd at 18106 ¶ 12; *WealthTV*, 24 FCC Rcd at 12994 ¶ 55.

⁴⁷⁶ *See supra* ¶¶ 139-40.

⁴⁷⁷ *See supra* ¶ 32.

competitive harm is premised on not having at least {REDACTED} million subscribers.⁴⁷⁸

But the evidence shows that Tennis Channel would not reach at least {REDACTED} million subscribers, even if Comcast had accepted the 2009 proposal.⁴⁷⁹ According to Tennis Channel, carriage on Comcast's sports tier results in the network's total distribution of {REDACTED}

{REDACTED}⁴⁸⁰ But if Comcast had accepted Tennis Channel's proposal for D1 carriage in May 2009, then Tennis Channel would *still* have fewer than {REDACTED} million total subscribers.⁴⁸¹ Similarly, if Comcast were to distribute Tennis Channel to every Comcast subscriber, Tennis Channel would still have insufficient distribution to meet the {REDACTED} million subscriber threshold purportedly required by certain tennis rightsholders to broadcast their "most desirable matches."⁴⁸² Under these circumstances, Tennis Channel has not proved that Comcast's decision to decline the 2009 proposal was the proximate cause of the harm that Tennis Channel alleges.⁴⁸³

⁴⁷⁸ See, e.g., Tennis Channel Trial Brief at 15-17; Tennis Channel Exh. 18 (Complaint) ¶¶ 88-89.

⁴⁷⁹ See *supra* ¶¶ 141-44.

⁴⁸⁰ Tennis Channel Trial Brief at 15.

⁴⁸¹ See *supra* ¶ 141. Tennis Channel could, however, reach {REDACTED} million subscribers through additional carriage on its parent companies – DIRECTV and Dish Network – alone. See *supra* ¶ 144.

⁴⁸² See *supra* ¶ 142.

⁴⁸³ See *supra* ¶¶ 141-44.

III. Section 616 Is Not Intended to Eliminate Carriage Differences Among Networks Resulting from Natural Competitive Forces

185. The evidence shows that Tennis Channel differs from Versus and Golf Channel in numerous significant respects that are reflected in how those networks are carried throughout the marketplace.⁴⁸⁴

186. Tennis Channel was launched in 2003, years after Versus and Golf Channel launched and obtained broad carriage. The evidence shows that, as a result, Tennis Channel launched into materially different market conditions.⁴⁸⁵ As set forth above, it was far easier for cable networks to gain broad distribution in the 1990s, before sports tiers were created, than it was in 2003.⁴⁸⁶ Unlike Tennis Channel, Versus and Golf Channel also built their distribution by paying distributors, including Comcast, hundreds of millions of dollars in launch incentives to offset the cost of broad carriage.⁴⁸⁷ The difference in market conditions is reflected in the carriage agreements that Tennis Channel signed with MVPDs, including Comcast, that permitted carriage on a sports tier in order to obtain distribution.⁴⁸⁸

187. Moreover, Comcast executives, including Mr. Rigdon, based on his independent experience at Charter, testified that demand for Tennis Channel is

⁴⁸⁴ See *supra* ¶¶ 73-102.

⁴⁸⁵ See *supra* ¶¶ 74-77. Mr. Solomon testified that eight years is a “long time” by “the cable business standard.” *Supra* ¶ 75 n.185; see also *WealthTV*, 24 FCC Rcd at 13000 ¶ 65 (timing of market entry of two networks is a relevant distinguishing factor). Cases from the employment discrimination context, while implicating different policy concerns, can be instructive as to general principles of discrimination. *Cf. Shah v. Gen. Elec. Co.*, 816 F.2d 264, 271 (6th Cir. 1987) (length of employment is a relevant distinguishing factor when comparing two employees).

⁴⁸⁶ See *supra* ¶¶ 74-76.

⁴⁸⁷ See *supra* ¶ 14.

⁴⁸⁸ See *supra* ¶¶ 16-19.

significantly less than demand for Golf Channel or Versus.⁴⁸⁹ Tennis Channel produced no evidence to the contrary; in fact, Tennis Channel's own documents acknowledged this discrepancy.⁴⁹⁰ The difference in the demand for the programming broadcast on Tennis Channel compared to the programming on Golf Channel and Versus is also reflected in vast cost differences for the programming that they respectively acquire and in their different ability to attract or retain subscribers.⁴⁹¹

188. The evidence also shows material differences in how the networks are positioned with respect to viewers, advertisers, and programming rights holders. Tennis Channel's own demographic data and marketing presentations demonstrate the clear differences in the networks' "target demographic group[s]."⁴⁹² Golf Channel and Versus viewers are two of the most male-skewing channels on television, whereas Tennis Channel – as it regularly emphasizes in pitches to advertisers and distributors – has an audience with a relatively even gender balance.⁴⁹³ In addition, Tennis Channel's viewers are significantly {REDACTED} than Golf Channel's and {REDACTED} than Versus's.⁴⁹⁴ As a result of these disparities, advertisers view the networks very differently.⁴⁹⁵

⁴⁸⁹ See *supra* ¶¶ 78-79.

⁴⁹⁰ See *supra* ¶ 20 n.38 {REDACTED}

⁴⁹¹ See *supra* ¶¶ 79, 93.

⁴⁹² *WealthTV*, 24 FCC Rcd at 12980-81 ¶¶ 27-29; see *supra* ¶¶ 85, 88.

⁴⁹³ See *supra* ¶ 86.

⁴⁹⁴ See *supra* ¶ 88.

⁴⁹⁵ See *supra* ¶¶ 89-90.

189. Those differences are reflected in the respective image each network projects to its viewers.⁴⁹⁶ As Mr. Egan observed in his credible and un rebutted testimony, Tennis Channel projects a “hip,” “international” and “young” cosmopolitan image.⁴⁹⁷ In contrast, Golf Channel projects a “calm,” “mature” and country club persona, and Versus generally projects an “aggressive” and “violent” image.⁴⁹⁸

190. Perhaps the most compelling evidence that market forces, and not discrimination, dictate how the three networks are carried is that every major MVPD except Dish Network carries Versus and Golf Channel to more than [REDACTED] percent of its subscribers, and all major MVPDs, including DIRECTV and Dish Network, carry Versus and Golf Channel more broadly than they carry Tennis Channel.⁴⁹⁹

191. Market forces also were the cause of Comcast’s decisions relating to the Major League networks. The un rebutted testimony of Mr. Bond and Ms. Gaiski demonstrates that Comcast’s carriage decisions regarding MLB Network, NBA TV, and NHL Network were based on legitimate business reasons, including the negotiating strength of the Major Leagues and the popularity of their out-of-market packages, as well as the networks’ programming and the price reductions they offered.⁵⁰⁰ Tennis Channel offered no contrary fact evidence.

⁴⁹⁶ See *supra* ¶¶ 80-84.

⁴⁹⁷ See *supra* ¶ 80.

⁴⁹⁸ See *supra* ¶ 80.

⁴⁹⁹ See *supra* ¶ 60.

⁵⁰⁰ See *supra* ¶¶ 61-65.

IV. Comcast Was Not Required to Conduct a Cost-Benefit Analysis of Golf Channel and Versus in 2009

192. Section 616 does not require that the same cost-benefit analysis calculated on Tennis Channel's 2009 proposal also have been administered to Golf Channel and Versus.⁵⁰¹ Both networks were well established in the market by 2009 and were not seeking to expand distribution beyond already existing levels.⁵⁰² Both networks were launched and achieved wide distribution during different market conditions when Tennis Channel did not yet exist.⁵⁰³ Tennis Channel lacks legal standing to claim discrimination as to how Versus and Golf Channel were treated in that earlier period, or to the consequences of that treatment years later in 2009.⁵⁰⁴

193. Even if Tennis Channel did have legal standing to challenge the past treatment of Golf Channel or Versus, Tennis Channel has failed to show that any of Comcast's carriage decisions would not have passed a cost-benefit test. In fact, Comcast presented evidence that Golf Channel and Versus together paid hundreds of millions of dollars in launch incentives to distributors including Comcast to earn broad distribution.⁵⁰⁵ Tennis Channel failed to contest that proof. In addition, the cable industry changed dramatically between 1995 and 2009,⁵⁰⁶ and Section 616 does not

⁵⁰¹ See, e.g., *MASN*, 25 FCC Rcd at 18106 ¶ 12; *WealthTV*, 24 FCC Rcd at 13000 ¶ 69.

⁵⁰² See *supra* ¶¶ 55-59.

⁵⁰³ See *supra* ¶ 55.

⁵⁰⁴ See *WealthTV*, 24 FCC Rcd at 12998 ¶ 65 (defendants could not have favored INHD over WealthTV in their 2003 decision to carry INHD "***because WealthTV had not yet launched at the time the defendants decided to carry INHD***" (emphasis in original)).

⁵⁰⁵ See *supra* ¶ 14.

⁵⁰⁶ See *supra* ¶¶ 11-15, 55-56, 74-77.

require MVPDs such as Comcast to make the same carriage decisions in different market conditions.⁵⁰⁷

194. The fact that carriage contracts periodically come up for renewal does not change the legal analysis. When a renewal merely involves extending a contract without material increases or decreases to distribution, it is not unlawful discrimination for an MVPD to keep the existing distribution in place without performing a full cost-benefit analysis.⁵⁰⁸ Such was the case at Comcast when the Versus and Golf Channel contracts were renewed in 2009 and 2011.⁵⁰⁹

195. The evidence was also uncontroverted that distributors rarely reposition established, broadly distributed networks such as Golf Channel and Versus because doing

⁵⁰⁷ *WealthTV*, 24 FCC Rcd at 12998-99 ¶ 64-65, 67 (recognizing that substantially different market conditions in different time periods resulted in different carriage objectives and decisions); *see also MASN*, 25 FCC Rcd at 18015-06 ¶ 13 & n.68 (finding that TWC legitimately considered the characteristics of different markets when making its carriage decisions for MASN and for its affiliated RSNs); *cf. Jones v. Unisys Corp.*, 54 F.3d 624, 632 (10th Cir. 1995) (holding that defendant employer's shift over time from seniority-based to skills-based layoff criteria was not evidence of its discriminatory intent).

⁵⁰⁸ *MASN*, 25 FCC Rcd at 18106 ¶ 12 (“[A] vertically-integrated MVPD ‘[may treat] unaffiliated programmers differently from affiliates, so long as it can demonstrate that such treatment did not result from the programmer’s status as an unaffiliated entity.’”); *WealthTV*, 24 FCC Rcd at 13000 ¶ 69 (“The defendants are not obligated to employ identical criteria in their carriage decisions; they are only required not to discriminate on the basis of affiliation or non-affiliation.”); *cf. Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006 (10th Cir. 1996) (finding that defendants had a legitimate business reason for not hiring plaintiffs because it was permissible to use different criteria to assess existing employees and new employees), *overruled in part on other grounds by Smith v. City of Jackson*, 544 U.S. 228 (2005); *Shah*, 816 F.2d at 271 (differential treatment of two employees did not raise inference of discrimination because one employee had worked at the company for more than twenty years while the other had worked at the company less than twenty months); *Pierson v. Norcliff Thayer, Inc.*, 605 F. Supp. 273, 277 (E.D. Mo. 1985) (differential treatment of employees was not considered discriminatory in part due to employees’ different levels of seniority).

⁵⁰⁹ *See supra* ¶ 56 & n.134.

so would upset the settled expectations of subscribers and generate subscriber churn.⁵¹⁰ There was testimony, for example, that when Charter threatened to negatively reposition Golf Channel and Versus in 2007, it received so many calls and e-mails from disgruntled subscribers that its call center was overwhelmed.⁵¹¹ It is not discrimination for MVPDs, such as Comcast, to seek to minimize this type of subscriber discontent by keeping well established networks in place.

196. Because Tennis Channel has presented no evidence that Comcast's carriage decisions as to Golf Channel and Versus were not justified on a cost-benefit basis, and has failed to controvert the evidence that the decisions were justified on that basis, Tennis Channel has failed to show that Comcast's cost-benefit analysis of the 2009 proposal was discriminatory.

V. Tennis Channel Has Failed to Establish That the Relief That It Requests Is Necessary or Appropriate

197. Tennis Channel has not proved the required elements for a Section 616 claim, and thus is not entitled to any relief in this matter.

198. In addition, the mandatory carriage and significant increase in total license fees that Tennis Channel is seeking in this matter are not proper under Section 616. Tennis Channel has failed to show that it is entitled to mandatory carriage at all, much less the mandatory carriage that it requests, which goes far beyond the network's acceptance by the marketplace generally. Further, mandatory carriage at increased total

⁵¹⁰ See *supra* ¶¶ 57-58.

⁵¹¹ See *supra* ¶ 59.

fees would constitute an economic windfall to Tennis Channel and not remediation of any competitive harm.⁵¹²

199. The appropriate remedy if a violation had been found in this matter would be the imposition of a forfeiture pursuant to Section 1.80 of the Commission's rules.⁵¹³

But, as set forth above, there is no violation.

**A. Broader Carriage of Tennis Channel
by Comcast Should Not Be Mandated**

200. Tennis Channel has failed to carry its burden of proving that broader carriage should be mandated.⁵¹⁴

201. High substantive and procedural standards ensure the protection of First Amendment rights, including Comcast's right to exercise its editorial discretion without governmental interference.⁵¹⁵ The Supreme Court has made clear that "where the scales are in . . . an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech."⁵¹⁶ Courts have recognized the importance of not

⁵¹² See *WealthTV*, 24 FCC Rcd at 12994 ¶ 55 ("Sections 616 and 76.1301(c) are designed to 'strike a balance that not only proscribe[s] the behavior prohibited by the specific language of the statute, but also preserve[s] the ability of affected parties to engage in legitimate negotiations.'" (quoting *Second Report & Order*, 9 FCC Rcd at 2648 ¶ 14)).

⁵¹³ See 47 C.F.R. § 1.80.

⁵¹⁴ See Tennis Channel Exh. 18 (Complaint) ¶¶ 101-103.

treading on cable operators' editorial discretion.⁵¹⁷ The Commission has recognized this principle in the program carriage context.⁵¹⁸

202. In *MASN*, the Commission found “that the Bureau misapplied Section 616(a)(3)’s standard by failing to give due credit to TWC’s proffered reasons for declining to carry *MASN* on an analog tier” and that the defendant’s “carriage decision was a reasonable exercise of editorial discretion.”⁵¹⁹ Thus, considerable deference should be given to Comcast’s editorial decision to place Tennis Channel on a sports tier to broaden the diversity of its programming without increasing the costs to its customers.⁵²⁰

203. The government has no interest – much less a compelling interest – in forcing broader carriage when the parties have an existing deal that grants Comcast the right to carry Tennis Channel on a sports tier, and when Tennis Channel could obtain increased distribution by lowering its price and/or providing Comcast with other

⁵¹⁷ See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979) (“[W]e are unable to ignore Congress’ stern disapproval . . . of negation of the editorial discretion otherwise enjoyed by . . . cable operators”); *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1135 (D.C. Cir. 2001) (“[W]e cannot see how the word unfair could plausibly apply to . . . legitimate, independent editorial choices”); see also *Turner Broad. Sys., Inc.*, 512 U.S. at 636-37 (“There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. . . . [T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.”).

⁵¹⁸ See, e.g., *MASN*, 25 FCC Rcd at 18106 ¶ 12.

⁵¹⁹ *Id.*

⁵²⁰ See *Kucinich*, 23 FCC Rcd at 482-83 ¶ 2; cf. *CBS, Inc.*, 453 U.S. at 396 (“The Commission has stated that, in enforcing [Section 312(a)(7) of the Communications Act of 1934], it will provide leeway to broadcasters and not merely attempt *de novo* to determine the reasonableness of their judgments.” (internal quotation marks omitted)); *Miami Herald Publ’g Co.*, 418 U.S. at 258.

incentives.⁵²¹ In particular, the government cannot impose speech upon Comcast simply to provide economic gain to Tennis Channel.⁵²²

B. The Level of Carriage That Tennis Channel Demands Is an Inappropriate Remedy for Tennis Channel's Claim

204. Mandatory carriage at the penetration requested by Tennis Channel is especially inappropriate. The additional carriage that Tennis Channel requests goes beyond the level it proposed in 2009, and far beyond Tennis Channel's carriage in the marketplace generally. The carriage requested by Tennis Channel would result, for example, in more Comcast subscribers to Tennis Channel than the [REDACTED]

[REDACTED]
[REDACTED] }⁵²³

205. "[A] case-by-case determination of the appropriate remedies based on the specific behavior involved in a particular violation provides the only reasonable and meaningful method of enforcing Section 616."⁵²⁴ Here, the "specific behavior" challenged by Tennis Channel is Comcast's rejection of Tennis Channel's 2009 proposal for D0 or D1 carriage.⁵²⁵ Thus, ordering any carriage broader than the D1 carriage that Tennis Channel would have accepted in 2009 would not be appropriate under any

⁵²¹ See *supra* ¶¶ 138-40, 149.

⁵²² See *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 800 (1988) (First Amendment prohibits the government from compelling speech "absent compelling necessity, and then, only by means precisely tailored"); see also *WealthTV*, 24 FCC Rcd at 12994 ¶ 55.

⁵²³ See *supra* ¶ 148.

⁵²⁴ *Second Report & Order*, 9 FCC Rcd at 2653-54 ¶ 27.

⁵²⁵ See, e.g., Tennis Channel Exh. 18 (Complaint) ¶ 52; Tennis Channel Opening, Apr. 25, 2011 Tr. 116:5-12.

circumstances because it would not be “based on the specific behavior involved in [the alleged] violation.”⁵²⁶

206. Further, mandating the additional carriage that Tennis Channel demands – or even the additional carriage that Tennis Channel requested in 2009 – would be contrary to Congress’s instruction to the Commission that, in implementing Section 616, it should “rely on the marketplace to the maximum extent feasible.”⁵²⁷ Tennis Channel’s own figures show that distributors (other than Comcast) carry the network at an average penetration of only [REDACTED] and that number is inflated by the fact that it includes DIRECTV and Dish Network, which carry the network pursuant to equity-for-carriage deals, and does not take into account the large number of distributors that do not carry Tennis Channel at all.⁵²⁸ If DIRECTV and Dish Network are excluded because of their affiliation with Tennis Channel, then Tennis Channel’s average carriage in the marketplace (again not including Comcast or distributors that do not carry it) is only [REDACTED] }⁵²⁹ It would be inconsistent with the requirement that the Commission “rely on the marketplace to the maximum extent feasible” to mandate carriage at any greater level of penetration.

⁵²⁶ *Second Report & Order*, 9 FCC Rcd at 2653-54 ¶ 27.

⁵²⁷ 1992 Cable Act § 2(b)(2); *see also WealthTV*, 24 FCC Rcd at 12994 ¶ 55.

⁵²⁸ Comcast Exh. 201.

⁵²⁹ Comcast Exh. 201.

C. Tennis Channel Has Not Carried Its Burden of Proving That It Is Entitled to Any Additional License Fees

207. Increasing the total license fees would not be in the public interest, as it would impose additional costs on Comcast and, ultimately, its subscribers, in connection with carrying Tennis Channel more broadly.⁵³⁰ No such relief is warranted in this case.

208. In particular, Comcast should not, as Tennis Channel demands,⁵³¹ be mandated to carry Tennis Channel more broadly at the per-subscriber license fees set forth in the Affiliation Agreement. Carriage deals involve numerous interrelated terms, and the Affiliation Agreement is an integrated contract that grants Comcast the right to carry Tennis Channel on a sports tier.⁵³² The evidence shows that Tennis Channel justified its rate card by emphasizing the economics of sports tier carriage, and Comcast agreed to those rates only because it intended to carry Tennis Channel on a sports tier.⁵³³

209. Imposing those rates for broader, non-sports tier carriage – for which Comcast would *not*, as intended, be earning sports tier revenue – would deprive Comcast of the benefit of the bargain that the parties struck while granting an undeserved windfall to Tennis Channel. Although an increase in distribution might better enable Tennis Channel to compete for more advertising revenues or programming rights, Tennis Channel has not proved that it would be unable to compete fairly without dramatic

⁵³⁰ See H.R. Rep. 102-628, at 77 (“Fair competition in the delivery of television programming should foster the greatest possible choice of programming and should result in lower prices for consumers.”).

⁵³¹ Tennis Channel Exh. 18 (Complaint) ¶ 102.

⁵³² See *supra* ¶ 149.

⁵³³ See *supra* ¶ 16 n.31.

increases in Comcast's licensing fees, and remedial relief under Section 616 must be limited to what is necessary for an independent programmer to "compete fairly."⁵³⁴

210. The evidence contains several instructive examples in the marketplace where Comcast has provided broader carriage to networks that have agreed to economic terms that offset the additional cost to Comcast. Of particular note is the example of the NHL Network, a Major League network with programming that is significantly more compelling than Tennis Channel's programming in terms of its ability to retain or attract subscribers, which incentivized Comcast to melt it from the sports tier to D1 by offering a rate reduction that would result in no material increase in the total license fee paid by Comcast.⁵³⁵

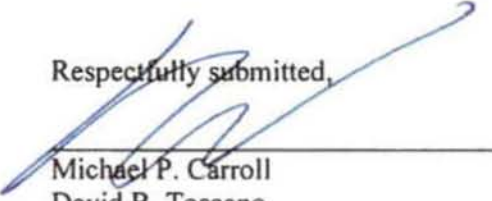
⁵³⁴ See 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

⁵³⁵ See *supra* ¶¶ 150-51.

CONCLUSION

For the foregoing reasons, Comcast respectfully requests that the Proposed Findings of Fact and Conclusions of Law be adopted by the Presiding Judge in support of a decision denying the relief sought by Tennis Channel in this carriage complaint proceeding.

Respectfully submitted,



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REDACTED VERSION

FILED/ACCEPTED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN - 7 2011

Federal Communications Commission
Office of the Secretary

In the Matter of

The Tennis Channel, Inc.,
Complainant

v.

Comcast Cable Communications, LLC,
Defendant

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MB Docket No. 10-204
File No. CSR-8258-P

JOINT GLOSSARY OF TERMS

REDACTED VERSION

JOINT GLOSSARY OF TERMS

À La Carte	Offering a network on an individual per-channel basis rather than as part of a package or tier of programming (defined below).
Ad Avails (or Advertising Availabilities)	Advertising units during the programming of a network (usually 2-3 minutes per hour) that are made available for the distributor to sell under a standard term of an affiliation agreement. The network reserves the remaining advertising time for sale itself.
Affiliated	A network is "affiliated" with an MVPD for the purposes of the program carriage rules if the MVPD holds an ownership interest in the network that is attributable under Section 76.1300(a)-(b) of the Commission's rules. As a general rule, a programmer is "'affiliated' with respect to a multichannel distributor if the distributor holds five percent or more of the stock of the programmer, whether voting or non-voting." <i>In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, Second Report and Order</i> , MM Docket No. 92-265, 9 FCC Rcd 2642 ¶ 19 (rel. 1993).
Affiliation Agreement	In this context, a contract pursuant to which content is licensed by a programming service (such as Tennis Channel) to an MVPD (such as Comcast) for distribution to the MVPD's retail subscribers.
Analog	<p>Cable systems distribute analog video signals in the form of modulated radio frequency transmitted through a closed transmission path such as coaxial cable or fiber. Interference or signal ingress during cable transmission, and the accumulation of "noise" as signals are amplified over the course of transmission, can result in reduced picture quality.</p> <p>Until recent years, all television signals for decades were analog, which requires substantially more bandwidth than digital signals for distribution of the same content. Many cable systems still distribute analog channels.</p> <p><i>Compare</i> Digital (defined below).</p>
Anchor Programming	A term used by Tennis Channel in this proceeding to refer to coverage of sporting events on a live basis or within two weeks after the event occurred.
B1	<i>See</i> Tier.

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B2	<i>See Tier.</i>
Bandwidth	<p>The capacity available for delivery of content (voice, video, and data) through a cable system.</p> <p>A standard-definition digital channel generally occupies about one-tenth the bandwidth of a linear analog channel, and a high-definition digital channel generally occupies about one-third the bandwidth of a linear analog channel.</p>
Carriage Agreement	<i>See Affiliation Agreement.</i>
CCR	Channel Change Request. A form submitted by Comcast system employees to Comcast regional, divisional, and corporate management for approval to change its channel lineup. Changes include launching a network on a system for the first time, dropping a network, moving a network to a new channel number, and/or moving a network to a new tier (melting or negative repositioning).
Channel Capacity	The maximum number of programming services that can be simultaneously carried within the bandwidth of a cable system devoted to video distribution.
Comcast	Defendant Comcast Cable Communications, LLC (itself or one of its affiliates).
Comcast Cable Communications, LLC	Subsidiary of Comcast Corp. that distributes multichannel video programming. Comcast Cable Communications, LLC is the Defendant in this case.
Comcast Corp.	Parent company to Comcast Cable Communications, LLC and Comcast Programming Group.
Comcast Programming Group	Until 2011, the group within Comcast Corp. that operated certain of Comcast's affiliated cable networks, including Versus and Golf Channel.
Comcast SportsNet	<p>The brand name for a group of regional sports networks that are affiliated with Comcast.</p> <p>The Comcast SportsNet services offer multi-sport programming.</p> <p><i>See RSN.</i></p>

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Core Audience	The demographic group (e.g., age and gender group) that predominates in a network's audience, or is the predominant target of its programming.
Coverage Area Rating	The number of households or persons viewing a network, as a percentage of all households or persons that receive the network. <i>Compare Total Market Rating.</i>
Crawl	Line of scrolling text moving ("crawling") across the screen.
D0	<i>See Tier.</i>
D1	<i>See Tier.</i>
DS	<i>See Tier.</i>
DBS	Abbreviation for "Direct Broadcast Satellite." An MVPD (defined below) that transmits video programming from satellites directly to dishes at the viewer's location. DIRECTV and Dish Network (also known as EchoStar) are DBS operators.
Digital	Video signals transmitted through encoding into streams of binary electronic "bits." Compared to analog distribution, digital signals are less susceptible to interference during transmission, resulting in higher signal quality and resolution. Digital signals require less bandwidth than would be required for analog signals distributing the same channel. <i>Compare Analog.</i>
Digital Classic	<i>See Tier.</i>
Digital Starter	<i>See Tier.</i>
Distribution Incentives	Consideration offered by a network that is designed to make it less expensive for an MVPD (defined below) to distribute or expand distribution of the network. Examples include cash, marketing assistance, discounted licensing fees, equity, or free periods of carriage. When distribution incentives are provided to encourage an MVPD to launch a programming service for the first time on a system, they also are referred to as "launch support" or "launch incentives" (defined below).
DMA	Abbreviation for "Designated Market Area." A geographical designation of a media market, created by Nielsen Media Research.

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Dual Illumination	The carriage of a network on more than one tier at once.
Freeview	Short for “free preview.” A period during which a network authorizes an MVPD to distribute its programming to incremental subscribers without charge to the incremental subscribers or to the distributor for these subscribers.
Golf Channel	A network focusing on golf and golf-related programming that, prior to the merger of Comcast and NBC-Universal, was wholly-owned by Comcast.
Grand Slams	The four most prestigious annual tennis tournaments: the Australian Open, the French Open, Wimbledon, and the U.S. Open.
HD	Abbreviation for “High Definition.” Digital transmission of video programming with substantially improved video and audio quality using any of the following formats: 1080p, 1080i, 720p.
Headends	Local facilities used to collect and transmit multichannel video programming from a distributor to the customer.
HH	Household.
Launch Support	Also known as “Launch Incentives.” Payments or other consideration offered by a network that is designed to pay an MVPD (defined below) to launch the network’s programming service or to distribute it more broadly. Examples include cash, marketing assistance, discounted licensing fees, equity, or free periods of carriage.
License Fee	<p>The fee that an entity pays for the right to distribute programming.</p> <p>In the context of a relationship between a network and an MVPD, the license fee, also called a carriage fee, is paid by the MVPD to the network in exchange for the right to carry the network. The license fee is typically specified in the affiliation agreement and expressed as an amount of money per subscriber per month.</p> <p>In the context of a relationship between a network and the owner of programming rights, see “Rights Fees.”</p>

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Licensing Rights	In the context of a relationship between a network and the owner of programming rights, the network's rights to telecast programming.
Linear Network	Linear networks, such as Tennis Channel, Golf Channel, and Versus, are channels that offer programming on a continuous and fixed schedule established by the network. <i>Compare VOD (defined below).</i>
Major Championships	Also called the "Majors." The four most prestigious annual men's golf tournaments: the Masters Tournament, the U.S. Open Championship, the British Open Championship, and the PGA Championship.
Major League Sports Networks	The primary national leagues that offer team sports in the United States are the National Football League, the National Basketball Association, Major League Baseball, and the National Hockey League. Each league has a network that offers live games and other programming related to that league's sport: respectively, the NFL Network, NBA TV, the MLB Network, and the NHL Network.
Melt	To move a channel from a less distributed to a more distributed tier of service (<i>e.g.</i> , from the Sports Tier to D1).
Metered Market	Nielsen-defined television market in which Nielsen measures audiences by way of electronic meters attached to television sets. There are 56 metered markets in the United States, reaching about 70% of all television homes in the country.
MFN	Abbreviation for "Most Favored Nations." A provision in affiliation agreements granting a distributor the right to be offered any more favorable rates, terms, or conditions subsequently offered or granted by a network to another distributor.
MSO	Abbreviation for "Multiple System Operator," which refers to a cable company that owns or operates multiple cable systems, often in different geographic locations. Comcast Cable Communications, LLC; Time Warner Cable; Cox; Cablevision; and Charter are the five largest MSOs in the United States.

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MVPD	Abbreviation for “Multichannel Video Programming Distributor.” An entity engaged in the business of making available for purchase by subscribers or customers, multiple channels of video programming. MVPDs include traditional cable operators, such as Comcast and Time Warner Cable, telephone companies, such as Verizon FiOS and AT&T U-Verse, and DBS operators, such as DirecTV and DISH Network.
Nielsen Local Market Rating	Total Market Rating published by Nielsen for a specific local market, as defined by Nielsen. <i>Compare Nielsen National Rating.</i>
Nielsen National Rating	Total Market Rating or Coverage Area Rating published by Nielsen for the Nielsen national market. <i>Compare Nielsen Local Market Rating.</i>
OLN	Outdoor Life Network (Versus’s name before 2007).
Penetration	A network’s “penetration” is a percentage reflecting the proportion of a particular MVPD’s subscribers that receive a particular network.
Prime Time	In general, the three evening hours (four on Sunday) programmed by broadcast and cable networks from 8 p.m. until 11 p.m. Eastern and Pacific Time and from 7 p.m. until 10 p.m. Central and Mountain Time, Monday through Saturday, starting an hour earlier on Sunday.
PSPM	Abbreviation for “per subscriber per month.” <i>See License Fee.</i>
Rate Card	The standard set of license fee rates offered by a programmer to MVPDs.
Rights Fees	A network’s payments to entities that own content for the rights to telecast specific programming owned by those entities.
RSN	Abbreviation for “Regional Sports Network.” A network that telecasts sports-related programming targeted to fans in a particular geographic region.
SD	Abbreviation for “Standard Definition,” which refers to transmission of video programming at traditional resolutions (e.g., 480i).
Shoulder Programming	Non-anchor programming shown on a network. <i>See also Anchor Programming.</i>

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Sports Entertainment Package (“SEP”)	See Tier.
Sports Tier	See Tier.
Subscriber	A customer of an MVPD. Sometimes referred to as a “sub.”
Telco	Abbreviation for “Telephone Company.” Refers to telephone companies, such as Verizon and AT&T, that provide multichannel video programming and are MVPDs.
Tennis Channel	A network focusing on tennis and other racquet-sport-related programming. Tennis Channel is unaffiliated with Comcast and is the Complainant in this case.
Tent Pole Content	A network’s marquee programming—in sports, for example, a key match or game coverage. An event that supports (<i>i.e.</i> , draws audiences to) content both before and after it.
Tier	<p>A bundle of cable programming services or networks sold to subscribers at a package price, or the level of service on which a channel is carried. Each tier typically carries an incremental cost to the subscriber.</p> <p>Tiers on Comcast cable systems include:</p> <ul style="list-style-type: none"> ▪ Broadcast Basic or B1: Broadcast Basic (or Limited Basic) generally refers to the most highly penetrated level of analog service on Comcast systems. It is received by [REDACTED] Comcast’s video customers. This package contains the broadcast networks and certain other governmentally mandated content. ▪ Expanded Basic or B2: Expanded Basic refers to the most highly penetrated level of analog service on non-digitized Comcast systems after government-mandated broadcast basic. ▪ Digital Starter, D0, or Digitized Expanded Basic: Digital Starter is the most broadly distributed digital tier, and the most highly penetrated level of service on digitized Comcast systems after government-mandated broadcast basic. In 2009, Digital Starter had approximately [REDACTED] subscribers. Taken together, Expanded Basic and Digital Starter are received by about [REDACTED] of Comcast’s subscribers. ▪ Digital Preferred or D1: Digital Preferred is the second most broadly distributed digital tier and is distributed to

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	<p>██████████ of Comcast's total subscribers. In 2009, Digital Preferred had approximately ██████████ million subscribers.</p> <ul style="list-style-type: none"> ▪ Sports Entertainment Package (SEP) or Sports Tier: A package of sports-related channels which Comcast makes available to almost all of its subscribers for an additional monthly fee of approximately \$5-8. In 2009, approximately ██████████ subscribers ██████████ received the Sports Tier.
Total Market Rating	<p>The number of persons or households viewing a network, as a percentage of all television households in a market, whether or not those households receive the network.</p> <p><i>Compare Coverage Area Rating.</i></p>
TTC	Tennis Channel.
Versus	A network providing multi-sport programming that, prior to the merger of Comcast and NBC-Universal, was wholly-owned by Comcast. Formerly known as the Outdoor Life Network (OLN).
Vertically Integrated MVPD	A company that is affiliated with both an MVPD and a network. Comcast Corp. is vertically integrated.
VOD	<p>Abbreviation for "Video-on-Demand," which refers to programming offered on a per-program basis, either with or without a separate per-program fee (in this latter case – "Free VOD" or "Free On Demand"). Video-on-Demand programming typically can be viewed at any time selected by the viewer, often with pause, fast-forward and rewind functionality.</p> <p><i>Compare Linear.</i></p>
Weighted Average	An average in which each unit in the series being averaged is multiplied by a weight relative to its importance, the result summed and the total divided by the sum of the weights.